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No. 83-1500

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SUPER TIRE ENGINEERING COMPANY,
Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Did the opinion and award of Arbitrator Thomas Carey rendered on April 20, 1982 fail to draw its essence from the collective bargaining agreement between the parties?

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STATEMENT OF THE CASE

This case involves an effort by Super Tire Engineering Company ("Super Tire" or "the Company") to overturn a labor arbitration award. Super Tire and Teamsters Local Union No. 676 ("Local 676" or "the Union") are parties to a collective bargaining agreement. (Appendix F, attached to Petition for Writ of Certiorari, filed March 8, 1984.)[1] Article 6, Section 1 of the agreement provides for a grievance machinery culminating in arbitration to resolve disputes between the parties. (App. F at 57a-58a) Article 15 controls the discharge and suspension of employees. (App. F at 64a-66a) Pursuant

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[1]All references to the appendix refer to the appendices incorporated in the Petition for Writ of Certiorari filed by the petitioner on March 8, 1984.

to the contract, the Union challenged the discharge of employee Mitchell Gray which occurred on October 30, 1981. The matter was submitted to the New Jersey State Board of Mediation and a hearing was held before Arbitrator Thomas F. Carey on February 22, 1982. In an opinion and award rendered on April 20, 1982, the arbitrator overturned the discharge and ordered that Gray be returned to work subject to a four-month disciplinary suspension. (App. E at 27a-45a)

Certain portions of the collective agreement were directly involved in the arbitrator's decision. Article 15, Section 1 provides in relevant part:

> No employee may be discharged or suspended without just cause...Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this

> Section provide for immediate dismissal...Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning...The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:
>
> . . .
>
> (2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(App. F at 64a-65a)

In his opinion, the arbitrator first determined that the Company had met its burden of proving that the employee did drink during working hours. (App. E at 37a-39a) The arbitrator then turned to the contract to determine the effect of his factual finding. He noted that the

contract gives the Company the right to discharge employees guilty of certain offenses, including drinking, without first notifying the Union but he recognized that the contract also contains a "just cause" provision. The arbitrator ruled that the two sections "should be read in pari-materia" and continued:

> The Company's right to act under Article 15 is tempered, at least to the degree that such action need be exercised in a fair and even manner, rather than in an arbitrary or capricious fashion. Further, its intent to adhere to a strict application of conditions and requirements of Article 15 requires some form of advance notice.

(App. E at 40a)

Having concluded that the employee was guilty of the misconduct with which

he was charged and that a "just cause" determination was necessary in order to resolve the grievance, Arbitrator Carey undertook an examination of what he considered to be the background necessary to resolve the dispute. Regarding the application of the rule prohibiting drinking, the arbitrator noted that there were no prior instances of dismissal for this infraction and concluded that he was faced "with a situation of first impression." (App. E at 42a) The arbitrator stated that the grievant had faced discipline once before as a result of a drinking incident, although he noted that there was a dispute in the record as to whether the punishment in that case was for drinking or for refusal to leave the Company's premises when told to do

so. (App. E at 40a) In that instance, Mr. Gray was issued a notice of termination but this discipline was then rescinded by Super Tire and a one-day suspension was substituted.

In the letter advising Gray that it was rescinding the termination, Super Tire told him that he should "[p]lease remember that there is to be no drinking of alcoholic beverages on company premises nor during working hours." Arbitrator Carey quoted this portion of the letter and stated that it lacked a clear threat or warning that discharge would follow in the event of a future violation. He concluded:

> This lack of specificity in its warning is critical, given the fact that there had been no other prior application to any other employee of its strict adherence policy to this particular prohibition concerning

> drinking. Nor was such intent to strictly comply ever previously made known to the work force in general.

(App. E at 41a-42a)

Arbitrator Carey also discussed the past record of the grievant. He noted that Gray had been employed by Super Tire for thirteen years and that the only prior disciplinary infraction raised against Gray was the one-day suspension. "The work record of the Grievant over a thirteen-year period does merit consideration." (App. E at 42a) The arbitrator concluded that in light of all of these circumstances, the discharge penalty was too severe to withstand the contractual requirement for "just cause" and he ordered that a four-month disciplinary suspension be substituted for the discharge. The grievant was to

be reinstated with full salary and benefits, less outside earnings and/or compensation, retroactive to March 1, 1982. Additionally, the arbitrator stated that the suspension would be considered a final warning to the employee regarding any similar offense in the future. (App. E at 43a-44a)

By petition filed with the United States District Court for the District of New Jersey on June 16, 1982, Super Tire asked that the award of Arbitrator Carey be vacated as invalid and illegal. Local 676 answered and counterclaimed for enforcement of the award. Jurisdiction was based on 29 U.S.C. §185(a). The matter was heard by the district court on cross-motions for summary judgment and an order was issued on September 13, 1982

granting the Company's motion for summary judgment and denying the Union's cross-motion. (App. D at 25a-26a)

Local 676 appealed the decision of the district court and the Court of Appeals for the Third Circuit reversed. The court of appeals noted that although the collective agreement states that an employee found to be drinking during working hours "may be dismissed or suspended for his first offense," nothing in the contract precludes review of such discipline as to the existence of just cause. Additionally, it noted that while such drinking is cause for "immediate dismissal," there is no provision equating causes for immediate dismissal with "just cause" for discharge. (App. A at 7a) The court of appeals reaffirmed

its decision in Arco-Polymers, Inc., v. Local 8-74, 671 F.2d 752 (3rd Cir. 1982), cert. denied, -- U.S.--, 103 S.Ct. 63 (1983). The court there had ruled that a labor contract providing for "just cause" for discharge and also speaking of specific offenses which make an employee subject to discharge may properly be read by an arbitrator to grant him or her the power to rule that although the particular offense was committed, just cause for the discharge does not exist.

The court of appeals in the instant matter went on to find that the contract did not preclude the arbitrator from determining that just cause should include an unambiguous warning that disciplinary policies will be strictly enforced. It also found that nothing in

the arbitrator's decision nullified any portion of the contract. "The warning and dismissal provision has not been nullified, but merely interpreted in light of industrial practice and principles of just cause. The district court is not free to reject that interpretation." (App. A at 9a)

The Court of Appeals for the Third Circuit denied Super Tire's petition for rehearing and rehearing in banc (App. B at 11a-12a) and the Company then filed a Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CONFORMS TO ACCEPTED PRINCIPLES OF JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS.

It is well established that the system of labor arbitration should be encouraged and that courts should pay great deference to decisions of labor arbitrators. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); W.R. Grace & Co. v. Local Union 759, --U.S.--, 103 S.Ct. 2177 (1983). In the instant case, the arbitrator did nothing more in rendering his decision than interpret the various provisions of the

collective agreement. The Court of Appeals for the Third Circuit correctly upheld his decision, stating, "The parties bargained for the arbitrator's construction of the contract and should be bound by it." (App. A at 9a-10a, citing W. R. Grace & Co., 103 S.Ct. at 2182; Enterprise Wheel, 363 U.S. at 599; Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1125 (3rd Cir. 1969).)

There is nothing in the collective bargaining agreement which prohibits the arbitrator from interpreting it as he did. As noted above, the contract states that, "No employee may be discharged or suspended without just cause." (App. F at 64a) Elsewhere, it states that certain offenses, including drinking during working hours, are "causes for dismissal

without first discussing the matter with the Business Agent" and do not require that the employee be given "at least one written warning" before dismissal. (App. F at 64a-65a) There is no provision whatever which equates the causes for immediate dismissal without consultation with the Business Agent with just cause for discharge.

While the arbitrator recognized that commission of one of the "cardinal sins" subjects an employee to different considerations than commission of other offenses, he found that the "just cause" requirement must be met in any situation. (App. E at 40a) Courts of appeals which have considered this issue have uniformly held that an arbitrator is within his or her authority in making such a deter-

mination. Arco-Polymers, Inc., 671 F.2d at 756-57; Chauffeurs, Teamsters and Helpers, Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir. 1980). Cf. Kewanee Machinery v. Local Union No. 21, 593 F.2d 314 (8th Cir. 1979)(Decision of arbitrator ordering reinstatement upheld where contract stated in one place that management had sole right to discharge employees and elsewhere that discharge must be for proper cause and where employer's absenteeism policy provided for discipline of employee who had the number of absences which the grievant was found to have had.); Falls Stamping & Welding Co. v. UAW, Local 1194, 575 F.2d 1191 (6th Cir. 1978)(Decision of arbitrator ordering reinstatement of wildcat

strikers upheld where contract provided that employees engaged in such a strike were subject to discharge but also provided that discipline for such misconduct was subject to the grievance procedure.); Timken Co. v. United Steelworkers of America, 492 F.2d 1178 (6th Cir. 1974)(Decision of arbitrator ordering reinstatement upheld where contract reserved for management its traditional rights, which the court found would include "formulat[ing] unilaterally rules of conduct and penalties for violations," 492 F.2d at 1179, and also gave arbitrator right to decide if discharge was improper or without just cause. The arbitrator found the employee to have committed the charged misconduct but ruled that termination was too severe a

penalty.); IAM v. San Diego Marine Construction Corp., 620 F.2d 736 (9th Cir. 1980)(Decision of arbitrator ordering reinstatement upheld where arbitrator found the employee guilty of insubordination such as to create just cause for discipline but ruled that discharge was too severe).

Having determined that "just cause" was required to sustain the discharge in the case at bar, Arbitrator Carey applied traditional arbitral considerations to the case. First, he noted that there had been no prior instances of an employee being discharged for violation of the drinking prohibition. Second, he noted that when this employee was disciplined previously for an incident involving drinking, the penalty imposed was a one-

day suspension and the employee was simply reminded of the prohibition on drinking without being told that discharge would follow if he violated the rule again. Finally, the arbitrator referred to the employee's thirteen year employment history with Super Tire and pointed out that the only prior discipline which was raised against him was the one-day suspension. (App. E at 40a-43a) Based on these considerations, he determined that there was not just cause for discharge but that the appropriate penalty was a four month suspension and a final warning regarding future misconduct of this sort. (App. E at 44a)

Respondent respectfully disagrees with the assertion of the petitioner that

the arbitrator's decision nullified any portion of the contract. The provision of the collective agreement dealing with progressive discipline states that except in the case of employees charged with one of the "cardinal sins," each employee is entitled to a written warning before he can be dismissed or suspended. (App. F at 65a) Super Tire errs when it asserts that Arbitrator Carey nullified this portion of the contract by pointing to the failure of the Employer to put the employee here on notice that violation of the drinking prohibition would result in his discharge. The notice requirement which the arbitrator raised is in the nature of a procedural right as opposed to the substantive right existing for lesser forms of misconduct which gives

employees the equivalent of one such act of misconduct with no penalty beyond a warning. It is noteworthy in this regard that the arbitrator did not rule that all employees charged with commission of one of the specified offenses are entitled to a prior warning but rather held that this particular employee, who had a relatively good record during thirteen years of employment, was entitled to be put on notice that a prohibition which had not led to any discharges in the past would lead to his discharge if violated.

It must also be recognized that Arbitrator Carey did not reduce the discipline imposed for one of the "cardinal sins" to that which is specified as appropriate for other types of misconduct. The contract requires that

an employee charged with a non-specified offense receive only a written warning in the first instance and goes on to require that the written warning be removed from his record after six months. (App. F at 65a-66a) Here, in contrast, the arbitrator ordered that the employee suffer a four month suspension and that he be placed on final warning that similar misconduct in the future would result in his discharge. (App. E at 44a)[2]

Arbitrator Carey did nothing more than determine that just cause was required to sustain the discharge and that such just cause was not demonstrated. He applied the considerations which arbitrators normally

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[2]Although Super Tire claims that the employee was previously charged with the same offense, the arbitrator noted that the record was unclear as to whether the previous discipline was for drinking on

apply in making such a decision and he substituted a severe penalty for the ultimate penalty in industrial relations. The Company and the Union agreed that matters such as the discipline of Mitchell Gray would be decided by an arbitrator and they must both live with that agreement. "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." Safeway Stores v. American Bakery and Confectionery Workers, 390 F.2d 79, 84 (5th Cir. 1968).

II. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner cites as a ground for granting a writ of certiorari a supposed

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Company property or for failing to leave the area when ordered to do so. (App. E at 40a)

conflict between the decision of the Third Circuit here and prior decisions from other circuits. A careful examination of the cases cited by petitioner shows that no such conflict exists. In Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977), the court overturned an arbitration award which reinstated an employee who had failed to settle bills and funds within a specified period. The contract there specifically stated that such conduct constituted just cause for discharge. Id. at 693-694. Similarly, in International Union of Operating Engineers, Local 670 v. Kerr-McGee Refining Corp., 618 F.2d 657 (10th Cir. 1980), the court reversed an arbitrator's award of reinstatement when the arbitra-

tor had determined that the employee abused sick leave and made false statements to obtain benefits and the contract specifically provided that such conduct "will be cause for discharge." Id. at 658. Likewise, the arbitrator was reversed in Morgan Services, Inc. v. Local 323, --F.2d--, 115 LRRM 2368 (6th Cir. 1984)(App. G at 73a-89a). In that case, the arbitrator ruled that an employee was guilty of insubordination but ordered his reinstatement notwithstanding a provision of the contract stating that an employee was subject to discharge without redress if proven guilty of insubordination. (App. G at 78a-80a) In the instant case, there is no contractual provision denying an employee charged with drinking on the job

the right to seek redress through arbitration nor is there any provision stating that such an offense constitutes the necessary "just cause" for discharge.

The other cases cited by petitioner likewise fail to disclose a conflict between the circuits. In International Brotherhood of Firemen v. Nestle Co., 630 F.2d 474 (6th Cir. 1980), the arbitrator was reversed for ordering reinstatement of an employee who was found guilty of insubordination under a provision stating that insubordination "shall constitute cause for dismissal." Id. at 475-76. The arbitrator's opinion incorrectly stated that the contract provided that "insubordination may be just cause for discharge" and used this manufactured

permissiveness to justify reinstatement. Id. at 476. Here, there has been no assertion that Arbitrator Carey misstated the contract; Super Tire simply claims that he misapplied it.

In Buckeye Cellulose Corp. v. District 65, UAW, 689 F.2d 629 (6th Cir. 1982), the arbitrator was also overruled. The arbitrator there first ruled that the employer had not violated any provision of the contract by discharging an employee but then reduced the penalty to a suspension, apparently because he felt that the employer had acted unfairly in refusing the union certain information with which to prepare for the arbitration. Id. at 629-30. The court found that reliance on notions of "fundamental fairness" was improper where the arbitra-

tor determined that the discharge did not violate the contract. Id. at 630-31. In the present case, the arbitrator specifically ruled that the discharge of Mitchell Gray under all the circumstances was not proper under the contract. (App. E at 43a)

Finally, the petitioner cites Amanda Bent Bolt Co. v. UAW, 451 F.2d 1277 (6th Cir. 1971). The arbitrator there was reversed for ordering employees reinstated after their participation in an illegal strike, which the contract said "may be made the subject of disciplinary action, including discharge." Id. at 1279. The arbitrator based his award on the employer's action in suggesting that the dischargees apply for re-employment as new hirees, which he

found to suggest that the discharges were an improper punitive measure. Id. at 1280. In the instant case, the arbitrator did not raise any similar employer conduct after the discipline was imposed but relied solely on the contract and the events leading to the discharge. Additionally, Amanda predates most of the cases cited here and appears to have been largely limited to its facts by subsequent Sixth Circuit decisions in Timken Co. and Falls Stamping & Welding Co.

The decision of the Third Circuit in the instant case does not create a conflict among the circuits. The court followed accepted principles of law in finding that the question before it was limited to a determination of whether the

award "'draws its essence from the collective bargaining agreement.'" (App. A at 6a, quoting W.R. Grace & Co., 103 S.Ct at 2182 and Enterprise Wheel, 363 U.S. at 597.) Having properly found that it did so, the court upheld the arbitrator's decision, consistent with the teachings of this Court and with prior decisions of the other circuits.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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